United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-7534

Original

To be argued by
BURTON S. COOPER

United States Court of Appeals

FOR THE SECOND CIRCUIT

LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, District Attorney of Westchester County,

Defendan -Appellee.

B pls

REPLY BRIEF

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REPLY BRIEF

The Circumstances of This Case Warrant the Intervention of the Federal Court to Stay a State Court Prosecution Brought Pursuant to an Indictment Which Was Unconstitutionally Secured

In arguing that the appellant has no Fifth Amendment right to an indictment by a grand jury in a state prosecution (p. 6 appellee's br.), the appellee misconceives the thrust of *Peters* v. *Kiff*, 407 U.S. 493 (1972) and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Both cases held that the systematic exclusion of a class of persons from service on juries was an unconstitutional deprivation of Fourteenth Amendment guarantees of equal protection and due process.

Further, in *Peters*, it was held that a "State cannot, consistent with due process, subject a defendant to *indict-*

ment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." [Emphasis supplied]. 407 U.S. at 502.

Appellee suggests that because there has been no judicial determination of unconstitutionality of the New York State Judiciary Law § 665(7) that the statute is not patently and flagrantly violative of the Constitution. He further suggests that in the absence of such judicial determination the statute was only possibly unconstitutional "on its face" and that, therefore, according to *Younger*,[1] an injunction should not issue.

Appellant submits that in *Younger* there was no prior adjudication of the unconstitutionality of a statute virtually identical with the statute in question. In that case, the statute in question had not been repealed by virtue of its recognized unconstitutionality and, in that case, the defendant had not conceded its unconstitutionality in the courts below. The New York statute is patently and flagrantly violative of the Constitution and the appellee does not and could not, in this Court, suggest otherwise.[2]

Appellee argues that *Taylor* should not apply retroactively to indictments prior to the *Daniel*[3] decision, notwithstanding *Daniel's* express rationale for denying retroactive application of *Taylor* to only those cases in which there has been a conviction. *Daniel* specifically

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[1] *Younger* v. *Harris*, 401 U. S. 37 (1971).

[2] Significantly, the *Younger* court also said: "A statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. . . ." 401 U.S. at 52.

[3] *Daniel* v. *Louisiana*, 420 U.S. 31 (1975).

stated that it sought to avoid the necessity for numerous retrials. It nowhere suggested that the principles enunciated in *Taylor* should not apply where, as here, no trial had been held.

Prosecution by state officials without hope of obtaining a valid conviction warrants federal injunctive relief against such prosecution. *Perez* v. *Ledesma,* 401 U.S 82, 85 (1971).

In this case, the appellee cannot hope to secure a valid conviction. Federal injunctive relief is appropriate.

CONCLUSION

The orders below should be reversed and the court below should be directed to issue a preliminary injunction.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

Of Counsel:

BURTON S. COOPER
DOUGLAS A. COOPER

United States Court of Appeals

376—Affidavit of Service by Mail ~~New York Supreme Court~~ The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

For the Second Circuit

Lorraine Berman
Plaintiff-Appellant

against

Carl A. Vergari, District Attorney of
Westchester County
Defendant-Appellee

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is agent for Shatzkin Cooper & Labaton the attorney for the above named Plaintiff-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 19th. day of December , 1975, he served the within

Reply Brief

upon the attorneys for the parties and at the addresses as specified below

Carl A. Vergari
District Attorney
of Westchester County
County Court House
White Plains, New York

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 19th.
day of December, 19 75

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977